THE MARSHALL: All rise.

This Honorable Court is again in session.

Be seated, please.

MR. HOGUE: Court please, I have just turned over to all counsel what we believe to be a statement, a handwritten statement, of Randy Kilgore that we have just found as being a part of the old Geders case, uh, there is also transcription found with it, and we have photostated both and turned them over to counsel.

THE COURT: Very well, Mr. Hogue.

MR. HOGUE: I believe all counsel has copies.

MR. CAMPBELL: I don't have the - -

MR. HOGUE: And - - I'm sorry. If the Court please, here is the original. If counsel would like to examine them - -

MR. CAMPBELL: We may have to, because I can't read half - -

MR. LEVINE: No, no, that's - -

THE COURT: I think what counsel meant, Mr. Campbell, was that he has the original handwritten if anybody wishes to compare it with the typewritten transcription is what he was talking about.

MR. CAMPBELL: I thought they were two separate documents.

THE COURT: Maybe I misunderstood. The typewritten is a transcription of the handwritten.

MR. HOGUE: No, sir, you understood correctly.

MR. CAMPBELL: Thank you.

THE COURT: Alright.

MR. LEVINE: Judge, although this is a rather brief statement, it is a rather significant one, because it is dated November 1971 and talks about the transaction that he said occurred in 1972. I am going to need some time to evaluate it. I don't know how he can make a statement in 1971 - - November of '71 about a '72 transaction.

THE COURT: Let me see the material.

(Pause.)

Alright, Mr. Heizerling.

* * *

MR. LEVINE: Judge, could we get some information on this Jencks Act statement of the witness that I have just been handed? It has been produced by Government counsel. And if I understand correctly, this is a statement - - the entirety of this statement is in the witness' own hand?

THE COURT: That was my understanding which counsel says they just discovered themselves in the file pertaining to the Geders case is what, uh - -

MR. HOGUE: Your Honor, to be more specific, it was a - - found in the U.S. Attorney's file on the Geders case today.

THE COURT: Is the Geders case - - when counsel uses that term, are they talking about number 73-69?

MR. HOGUE: Yes, sir. Yes, sir, that is the case. There were actually two trials.

THE COURT: As far as you know, it is a statement in response to counsel's question in the witness' own handwriting?

MR. HOGUE: We believe it to be. The witness has never seen that statement, like I say. I just saw it myself. But I can represent to the Court that I now have to conceive that this is his handwritten statement. If it's not, the witness may deny that.

MR. LEVINE: Judge, can we make a voir dire examination of the witness very briefly out of the presence of the Jury so that we wouldn't be - - Government counsel is of the impression - -

THE COURT: Well, I agree under those circumstances, if it is tendered as Jencks Act material, as it most certainly should be, given its content, and if it is in the

handwriting of the witness himself, on the other hand, I don't think counsel ought to be mislead by being given something which is Jencks Act material only to have the witness deny it unless he can call on Government counsel to impeach it or - - you see what I mean?

MR. HOGUE: Yes, sir, I do understand, and I want to make it clear that we have - - we had just found this statement ourselves, and we have never shown it to this witness.

THE COURT: I understand, and that is quite proper because I've instructed Government counsel at this point not to discuss the case with the witness.

Have the witness come in. Leave the Jury in the Jury room.

THE MARSHALL: Yes, Your Honor.

THE COURT: Hand me the original.

(Thereupon, the witness was brought into the Courtroom.)

THE COURT: Mr. Heizerling, hand this document to Mr. Kilgore, please.

THE CLERK: Yes, sir.

THE COURT: Mr. Kilgore, look at that document if you would that I've just asked the Clerk to hand to you.

Have you seen that before?

THE WITNESS: Yes, sir.

THE COURT: Is that your handwriting? Is that a document you, yourself prepared?

THE WITNESS: Yes, sir.

THE COURT: Alright.

Let it be marked as Court's Exhibit next in sequence.

MR. LEVINE: Judge, in light of that response, I would then have it marked as Defendant's, Alvarez, if I may, exhibit, because I am going to want to make inquiry of the witness about the document and show it to him.

THE COURT: Well, alright. Let it be marked in that

fashion.

Seat the Jury, Marshall.

THE CLERK: Defendant's, Alvarez, Exhibit Number Eighteen for identification.

(Thereupon, the Jury was returned to the Courtroom.)

* * *

Q Now, Mr. Levine had asked you some questions regarding a written statement that you made, or done, Defendant's Alvarez, Eighteen. Is that correct?

A That is correct.

Q Does the name, "Jerry Massler," appear anywhere in that document?

(Pause.)

A No, sir.

Q No, sir? Is that what your answer was? I'm sorry, I wasn't facing you.

A Sir?

Q What was your answer? I didn't hear you.

A Your - - was Massler? No, sir, he wasn't.

Q Was the trip to Mr. Massler's home on the first trip to New York mentioned in that document?

A No, sir.

Q Was the second trip to New York mentioned in that document?

A No, sir.

Q Was Mr. Massler mentioned by description in any manner, shape or form in that document?

A No, sir. It is a very brief document.

Q No details; is that correct?

A Yes, sir, that is correct.

Q No details like you made $500.00 a week guarding the stash house?

A What are you asking?

Q Was that in that document?

A Yes, sir.

Q Isn't that a detail?

A I guess it depends on how you look at it.

MR. HOGUE: Objection, Your Honor.

MR. GRABER: I'll withdraw it.

MR. HOGUE: Argumentative.

THE COURT: It is withdrawn.

BY MR. GRABER:

Q When did this trip to Columbia take place, sir?

A In April of '72.

Q Of '72.

Are you sure of that?

A Yes, sir.

Q Isn't it a fact that in that handwritten document of your's, you indicated that the trip took place a week or two after Christmas?

A It may say that, I don't know. I didn't - -

Q Well, would you look?

A Alright.

(Pause.)

Sir, I don't see it in here.

Q Alright. Isn't there a statement there that we - - that a week or two after Christmas Pedro and Scott said they would pay you to ride the plane down to Columbia to pick up marijuana?

A Yes, sir.

Q And isn't that when you went to Columbia?

A No, sir.

Q And do you recall that conversation a week or two after Christmas?

A There wasn't a conversation.

Q In other words, that which you put down, uh, sometime in the past was incorrect?

A That is correct.

Q And you wrote it in your own hand?

A Yes, sir.

Q And you wrote it at the request of law enforcement officials?

A Yes, sir.

Q And you wrote it at the request of law enforcement officials and you wanted to be truthful with them?

A Yes, sir.

Q And you are saying that that is not true?

A That is correct.

Q You are saying - -

A I'm not saying - -

Q You are saying that is a lie, sir?

A I'm not - - to your other question I'm not saying that that is an intentional mistake.

Q Well, sir, to go back, do you have any recollection of - - at all of when you wrote this?

A No, sir.

Q The date that appears thereon is November of 1971. Does that aid you in your recollection?

A No, sir, it doesn't. That doesn't mean that is the date I wrote it.

Q Well, what does that mean?

A I have no idea why that date is on there.

* * *

THE MARSHALL: All rise.

This Honorable Court is again in session. Be seated, please.

THE COURT: Good morning, counsel. Ready to proceed?

MR. GRABER: Yes, Your Honor.

THE COURT: Alright. Marshall, ask the witness to come - -

MR. LEVINE: Your Honor, if I may, please, Mr. Graber has indicated to me that he plans on offering in evidence, uh, the November, '71 statement of Kilgore. I forget the - - it is Defendant Alvarez Exhibit Number

Eighteen.

On behalf of my client, since it does mention my client and name him and detail him, I would specifically object to that item as an evidentiary item going before the Jury.

It is obvious why Mr. Graber wants it, because it doesn't mention Mr. Massler, but it specifically mentions my client, and as an evidentiary item, since the Jury would have it to go back into the Jury room with as all other items of evidence in, I would specifically object to it. And if Your Honor is inclined to admit it, I would ask for a severance of my client from this proceeding.

I mean, it is clearly exculpatory as it relates to Mr. Massler and inculpatory as it relates to my client, and that is the dilemma that each of us obviously has; one attempting to keep it out, to talk about it ourselves, and the other attempting to put it in, that being Mr. Graber, obviously.

THE COURT: Well, it is your intention to offer it, Mr. Graber, as suggested by counsel?

MR. GRABER: Yes, Your Honor. It is the first thing I intend to do this morning. It is clearly exculpatory as to Mr. Massler. It also is a statement that I believe is a detailed statement of the - - in relation to the testimony that he gave in this trial. If Your Honor will recall that he had indicated that this was only a brief summary of the events. I think the - - uh, the statement itself would speak for itself as to its great detail, including landing at Lakeland, making phone calls, uh, uh, then re-landing at Zephyrhills, etcetera. It is a very detailed statement. It does contradict the witness' testimony vis-a-vie my client, also contradicts his testimony in Court as it being just simply a general summary. And it does totally exculpate Mr. Massler. And, of course - -

THE COURT: Well, under Rule 801-D, it would not be

hearsay. If it is, in fact, inconsistent with the witness' testimony at trial, and I'll have to examine the exhibit in order to make that determination and reserve ruling on the offer.

MR. GRABER: The Clerk has it in his hand, Your Honor.

THE COURT: Alright.

MR. LEVINE: Your Honor, if I may - -

THE COURT: Let the record show that it has been offered and that the Court is reserving ruling pending a study of the exhibit.

* * *

MR. GRABER: Your Honor, before we proceed with another witness, I do have a offer of evidence, uh, Defendant Alvarez Exhibit Eighteen, which I would like offered as Massler's One in evidence. Your Honor did reserve decision.

THE COURT: I understand, Mr. Graber and - - I have reserved a decision, and I am going to look at it during the recess.

Did I understand there was objection, Mr. Levine?

MR. LEVINE: Yes, sir. As it relates to the Defendant Alvarez, uh, it specifically refers to him on at least one occasion, if not more, so we feel that it is prejudicial to - - as an evidentiary item. In a separate trial, if Mr. Massler were on trial separately, he may be able to admit it to show that there is no reference to him, but in these proceedings since my client's name is mentioned and the Jury will have that document before them in the Jury room, we submit that it would highlight and emphasize his activities and participation - -

MR. GRABER: If Your Honor pleases, if Your Honor will recall the testimony of Mr. Kilgore regarding this particular document, he said it was general in nature. As an explanation to why Mr. Massler's name nowhere appears on this particular document, I would submit

that what is general in nature may be open to interpretation and certainly cannot be handled through cross-examination of the witness whose interpretation may be different from mine, or the Jury's. And I would submit to Your Honor that this particular document should be shown the Jurors so that they themselves can determine whether or not there was not a detailed statement of an event in which my client is in no way involved in this particular situation described in Alvarez's Eighteen or proposed Massler's One.

THE COURT: Alright. What is the Government's position with respect to this Exhibit?

MR. HOGUE: Your Honor, we would object to the admission of it. As I understood counsel's reasoning for wanting to move it in evidence, it was for impeachment purposes, uh, and it was exculpatory in nature he claims because his client wasn't mentioned. But now he had the opportunity and did examine the witness in connection with the statement, and the best - - the best evidence - -

THE COURT: Write this down, Mr. Hogue. Write this down. During the recess examine Rule 613-D in relation to 801-D 1-A and 612.

MR. LEVINSON: Judge, for purposes of the record we would like on behalf of Mr. Wells to also object to the admittance of that statement. If anybody is prejudiced by the admittance of that statement, I would submit the Defendant Wells and perhaps Rice are. It makes referrence to them in innumerable times. It details the first proported April trip to Columbia with Rice and Wells.

THE COURT: I'll examine the statement myself, which I've not yet had a chance to do, in order to more intelligently rule on both the proffer and the objections. We'll be in recess for fifteen minutes.

* * *

THE COURT: Which I did make and I admitted those exhibits at that time.

Is the government - - what's the government's position on, uh, Defendant Massler's proffered Exhibit Number One?

MR. HOGUE: Your Honor, I guess we will withdraw the objection that we have had as to it.

THE COURT: You object, Mr. Levine?

MR. LEVINE: Yes, sir, and I object and I would urge the Court - - the reasoning the Court gave in precluding Mr. Levinson from writing on the chart in aspect of the witness' testimony, to emphasize the witness' testimony, meaning Mr. Levinson sought to write a question and then when the witness responded to the answer as to mileage or miles, Your Honor said, you can't do that because it's taken out of context and placing undue emphasis on an aspect of testimony that the jury is suppose to generally recollect. That particular document is a limited portion of Mr. Kilgore's testimony that is in written form and the jury is going to be able to take that back to the jury room and read it as opposed to relying on their recollection and it's highly prejudicial to my client and puts him in the middle of a conspiracy through the written information and that — it would tend to emphasize and corroborate testimony and I submit as a prior similar statement, they could ask - - conceivably ask him some questions about it but the document itself is not admissible even if the government sought to rehabilitate their witness in that fashion. The fact that we're all here on trial and the fact that it's in part exculpatory to Mr. Massler but incriminatory to my client obviously creates the dilemma. If we were on trial without Mr. Massler there would be no question about it coming in and it's only Mr. Massler who seeks to offer it and all the other Defendants who are named

object to it because of the significant prejudice which it bears.

No instruction to the jury would instruct the jury to not consider the item of documentation evidence which they take back to the jury room as to the guilt or innocence of my client.

MR. LEVINSON: I have an additional factor to add to Mr. Levine's objection. Mr. Wells' name is mentioned in that document, if not once, more than once. The prejudicial fact of the date and the purported events as described by that document, compared to the testimony elicited from Mr. Kilgore would far out-weigh any probative value the document might have. In addition thereto, if you recall the cross examination,- - I'm sorry, the direct examination of Mr. Kilgore by Mr. Hogue, he at that time, with the Court's permission, had full and ample opportunity to elicit from Mr. Kilgore the information contained on that document.

THE COURT: Well, it's offered by Defendant Massler, as I would understand it, though he has not specifically so stated. Pursuant to the provisions of Rule 613D of the new rules of evidence, because it's only pursuant to that provision of the rules that I can see it would be admissible when offered by that Defendant. It's hearsay to the other Defendants surely under Rule 801D as that particular rule was amended by the Congress prior to the adoptions of the rules and to my mind there is some ruling inconsistency or at least ambiguity and uncertainty in relationship of Rule 613 and 801 as a consequence. I think - - I think the objection of Mr. Levine would be well taken under ordinary circumstances but when it's offered by Mr. Graber from Mr. Massler, I think it's admissible under 613B, to the extent that it would be inconsistent, given the added circumstance that the Witness Kilgore was cross examined at length

by Mr. Levine with respect to the statements contained in the exhibit with particular reference to the date that appears on it, among other things, and the government's withdrawal of the objection that it previously announced, and it seems to me on balance, renders the document admissible under 613B and given the government's position, 801D1B, and I'll overrule the objections that have been stated and receive the exhibit in evidence. It should be remarked as Defendant Massler's Exhibit Number One, having previously been identified as Alvarez's Exhibit Number Eighteen.

MR. CAMPBELL: We'd like the Record to show specifically that the Defendant Rice objects to the document.

THE COURT: That's over the objection of all Defendants and all grounds previously stated other than, of course, the offering defendant, Mr. Massler.

MR. LEVINE: If Your Honor please, did I understand in the context of your reference to the last rule and the position of the government, is Your Honor viewing this as an offer on the part of the government also as a prior consistent statement?

THE COURT: No, they've not offered the exhibit.

MR. LEVINE: Okay, and that's why I wondered, the reference to the last rule in that context.

THE COURT: Only to demonstrate my train of thought to the extent that it would admissible if offered by the government even over your objection, under that provision of the rule and therefore it's admission on the proffer of the Defendant Massler without objection by the government, it seemed to me, uh, renders the objection that might otherwise be by you as you have made it on hearsay grounds, not well taken.

MR. LEVINE: Your Honor, in light of the ruling of the Court, the Defendant Alvarez would move for sev-

erance.

THE COURT: The Record will so reflect and I'll deny the motion.

MR. CAMPBELL: And the Defendant Rice.

THE COURT: All Defendants moving for severance, each from the other, and mistrial, if I understand it?

MR. LEVINE: Yes, sir.

THE COURT: The Record will so reflect and those motions will be denied.

We'll be in recess for lunch until 1:30.

MR. LEVINSON: One more thing - -

THE COURT: We'll be in recess until 1:30.

MR. LEVINSON: Okay, Judge.

THE MARSHALL: All rise. Court will be in recess until 1:30.

* * *

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA,
vs.
PEDRO ALVAREZ, ET AL. No. 75-181-CR-T-H

ADDENDUM CERTIFICATE

I further certify that counsel for the defense, Arnold Levine, Esq., wishes to note the following correction in the trial transcript of proceedings:

Page	Line	
1680	3	Corrected to read as follows: No instruction to the jury would cure the prejudice, and I would ask the Court to instruct the jury not to consider the item of documentation evidence which they take back to the jury room as to the guilt or innocence of my client.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed my seal this, the 6th day of August, 1976.